

STATE OF CALIFORNIA

SENATE SELECT COMMITTEE TO INVESTIGATE
PRICE MANIPULATION OF THE WHOLESALE ENERGY MARKET

HEARING RE: REVIEW OF ENRON'S COMPLIANCE WITH SUBPOENAS

STATE CAPITOL
ROOM 4203
SACRAMENTO, CALIFORNIA

TUESDAY, FEBRUARY 12, 2002

11:47 A.M.

Reported by:

Evelyn J. Mizak
Shorthand Reporter

APPEARANCES

MEMBERS PRESENT

SENATOR JOSEPH DUNN, Chair

SENATOR DEBRA BOWEN

SENATOR WES CHESBRO

SENATOR SHEILA KUEHL

SENATOR WILLIAM MORROW

SENATOR BYRON SHER

MEMBERS ABSENT

SENATOR MARTHA ESCUTIA

SENATOR MAURICE JOHANNESSEN

STAFF PRESENT

ALEXANDRA MONTGOMERY, Committee Consultant

RONDA PASCHAL, Committee Consultant

IRMA MORALES, Committee Assistant

LARRY DRIVON, Special Counsel to Committee

BOB PRATT, Legislative Counsel

DONNA DRIVON, Information Technician

ALSO PRESENT

SENATOR STEVE PEACE

INDEX

	<u>Page</u>
Proceedings	1
Opening Comments by CHAIRMAN DUNN.....	1
Inadequacy of Enron's Production of Documents.....	1
Enron's Failure to Produce Witness for Deposition re: Destruction of Documents	1
Review of Document Destruction	1
Status Update on Committee Work	1
Comments by SENATOR BOWEN re:	
Time for Committee to Act Tough.....	2
Sworn Testimony of LARRY DRIVON, Special Counsel	3
Issue One: Inadequacy of Enron's Production of Documents	3
Background.....	3
Issuance of Subpoena	5
Enron's Capitulation to Committee's Demands on September 14, 2001	5
Committee's Request for Price Forward Curves Documents.....	6
Importance of Documents	6
Length of Predictions in Price Forward Curves.....	7
Committee's Request for Financial and Accounting Documents	8
Telephone Conversations with RICHARD SANDERS, Vice President/General Counsel, Enron in Houston, Texas	9

Close to 100 Categories of Documents Not Represented in Enron's Depository.....	11
Current Status of Discussions with MR. SANDERS re: Missing Documents	12
Invitation for Staff to Go to Portland, Oregon and Houston, Texas to Seek Documents	12
Meeting off Senate Floor on September 14.....	14
Enron Offered No Reason for Not Producing Subpoenaed Documents	16
Date of Enron's Declaration of Bankruptcy.....	17
No Enron Representatives Present	18
Lack of Representation by Enron at All Committee Hearings	19
Two Resolutions Pending on Senate Floor On September 14, 2001 re: Enron	19
Recommended Sanction for Contempt.....	19
Divestiture Resolution	20
Recommendation to Committee re: Enron's Inadequate Production of Documents	21
Contempt Citation.....	21
Committee Dispatch Appropriate Staff to Portland, Oregon and Houston, Texas to Retrieve Any Available Documents	21
Statements by SENATOR MORROW re:	
September 14, 2001 Contempt Resolution Still on Senate Floor.....	22
Possibility of Amending Motion Rather Than Issuing New Resolution	23

Statements by SENATOR KUEHL re:

Continue to Accumulate Acts of Contempt..... 23

Need to Include Enron's Continuing Refusal to
Produce Documents 23

Statements by CHAIRMAN DUNN re:

Possibility of Amending Report Currently
Pending on Senate Floor, Adding Addendum..... 23

Recommended Sanctions in Original Report 24

Issue Two: Last Week's Scheduled Deposition..... 25

Enron's Lack of Attendance 25

Enron's Position that They Don't Know
What Documents Were Destroyed by
Arthur Andersen..... 25

Enron's Refusal to Send Witness to
Deposition..... 26

Proper Service of Subpoenas 26

Expansion of Deposition Subpoena's Scope
To Include Person Knowledgeable about
Enron's Destruction of Documents 27

MR. SANDERS' Contention that No One at
Enron Knows What Documents Were Destroyed
Or Who Destroyed Them..... 28

Questions by SENATOR KUEHL re:

MR. SANDERS' Assertions in Letter to
Committee, Dated February 5, 2002 29

Recommendation to Committee 30

Committee Find Enron in Contempt and
Refer It to Full Senate, and Levy of
Appropriate Sanctions 30

Questions by SENATOR MORROW re:

Arrest Authority.....	31
Request that to Extent Committee Has Power to Compel, that Legislature Should Exercise All Legal Authority to Compel Testimony.....	32

Statements by SENATOR CHESBRO re:

Three Ways Enron Has Demonstrated Contempt	33
---	----

Questions by SENATOR BOWEN re:

Proposed Sanctions.....	34
Possibility of Imposing Criminal Sanctions.....	35
Financial Sanctions.....	36

Questions by CHAIRMAN DUNN re:

Enron's Knowledge of Enron's Destruction Of Documents.....	37
Hiring of SHREDCO.....	37

Third Issue: Potential Destruction of Documents
By Enron or Its Agents..... 38

Background on Request for Standard Nondestruct Agreement.....	38
All Market Participants Have Refused To Enter into Such Agreement	39
Portion of Transcript from San Diego Court Hearing on November 30, 2001	39
Testimony of MICHAEL KIRBY, Attorney For Enron.....	40

Statements by SENATOR PEACE re:

State's Slowness in Moving on Enron.....	41
Focus of Investigation	42
Ability to Sanction Law Firm for Misrepresentations.....	42
Ability for Citizens to Pursue Bar Association Complaints Against Law Firm.....	43
Presentation of Two Video Tapes of ABC Nightly News	44

Further Testimony of MR. DRIVON re:

Enron Energy Services, Inc. and Enron Corporation.....	44
Videos Show Accounting and Financial Documents of Enron Energy Services and Enron Corporation Being Destroyed	45
Documents Destroyed during Senate's Fall Recess.....	46
Enron's Assertion They Don't Know Which Documents Were Destroyed	46
Enron's Inability to Assure Committee That Subpoenaed Documents Were Not Destroyed.....	47
Staff's Review of All Press Descriptions of Destroyed Documents.....	47
Testimony from Arthur Andersen re: Destruction of Documents	48

Questions by SENATOR MORROW re:

Assurances by Enron, Either Written or Oral, That They Would Not Destroy Documents.....	49
---	----

Questions by SENATOR PEACE re:

MR. KIRBY's Inference to Judge at
November 30 Hearing in San Diego
Forestalled a Court Order to
Preserve Documents 50

KIRBY's Call to Committee Consultant
Re: Nondestruct Agreement 51

Recommendations to Committee 52

Committee Find Contempt re: Enron's
Destruction of Documents Relative to
Subpoena, and Contempt Be Referred to
Full Senate for Appropriate Action 52

Committee Be Empowered to Compose and
Transmit to Appropriate Law Enforcement
Authority a Criminal Complaint and
Request for Prosecution 52

Sections 135 and 182 of Penal Code 53

Evidence Includes Coordination of
Activity by More than One Person 54

Questions by SENATOR MORROW re:

Possibility of Federal Violations 54

Appropriate Law Enforcement and
Prosecutorial Authorities 55

Evidence of Destruction of Subpoenaed
Documents 56

Enron's Connection with El Paso Natural Gas 57

Statements by SENATOR MORROW re:

Sufficient Evidence of Contempt Regarding
Noncompliance to Document Subpoenas and
Deposition Subpoenas 57

Evidence that Relevant Documents May
Have Been Destroyed 58

Statements by SENATOR BOWEN re:

Burden of Proof Shifts When Documents Have Been Deliberately Destroyed	59
---	----

Request for Clarification by SENATOR KUEHL re:

Proposed Motions.....	60
-----------------------	----

Statements by SENATOR PEACE re:

Important that Contempt Citation Be Overtly Connected to Public Charge of Committee.....	61
--	----

Deflection of Legislature's Time and Attention.....	61
--	----

Goal of Enron's Behavior Was to Forestall Attention at FERC	62
--	----

Need for Investigation into FERC	62
--	----

Policy Makers Need to Be on Faster Track.....	63
---	----

Committee's Action Today Could Be Most Critical Communication at Federal Level to Redirect Federal Investigation.....	64
---	----

Motion One	65
------------------	----

Request Full Senate Move Forward with Contempt Report Currently Pending on Floor, And Augment Report with Updated Factual Recitation of Occurrences Since Report First Submitted last August.....	65
---	----

Report Should Include Recommendations as to Appropriate Sanctions and Remedies to Force Attendance at Depositions	65
---	----

Motion Two	65
Committee Chair Be Authorized to Prepare a Complaint to All Appropriate Law Enforcement Agencies to Investigate the Potential for Criminal Violation of Penal Code Sections 135 and 182 by Enron re: Destruction of Subpoenaed Documents.....	66
Committee Action on Motion One.....	67
Committee Action on Motion Two.....	67
Termination of Proceedings.....	67
Certificate of Reporter	68

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01 P-R-O-C-E-E-D-I-N-G-S

02 -- oo0oo--

03 CHAIRMAN DUNN: Good morning, everybody, and
04 welcome to our Compliance Review Hearing regarding Enron.

05 There are three specific issues we intend to
06 address today. It's a new year. I will say in this new year
07 that this is expected to go short. Hopefully, my ability to
08 estimate since last year has improved.

09 There are three specific issues that we will be
10 addressing this morning. The first is the potential inadequacy
11 of Enron's actual production of documents to their depository
12 here in Sacramento.

13 Second, Enron's failure to produce any witness at
14 last week's deposition regarding the issue of the destruction of
15 documents.

16 And the third issue is, we will review the
17 potential destruction of documents and its relationship to the
18 subpoena that was served on Enron last June.

19 Very quickly for a status update on the work of
20 the Committee. As we discussed during the press conference in
21 January, the review of the documents continues, and we are in
22 the stages of announcing additional hearings relating to the
23 municipal electricity systems, the generators, traders, et
24 cetera. We will probably do a follow-up hearing or two with
25 respect to ISO and the PX, but as soon as those dates and
26 specific topics are selected, of course, we will let everyone
27 know.

28 This is the first in several hearings that we

0002

01 refer to as compliance hearings; that is, to review the
02 compliance of an individual, in this case market participant,
03 their compliance with our requests, subpoenas, et cetera. There
04 will be in the next few weeks additional compliance review
05 hearings addressing all of those that have been in the process
06 of producing documents for review by the Committee. But again,
07 as those dates are selected, we will certainly announce them.

08 We also expect additional depositions in the
09 coming weeks. They will cover a variety of different issues,
10 topics, market participants, et cetera. Again, we will announce
11 those very shortly.

12 Before I ask Mr. Drivon to be sworn in, let me
13 open it up for any of the other Committee Members that wish to
14 make any comments at this point in time.

15 Senator Bowen.

16 SENATOR BOWEN: Thank you, Senator Dunn.

17 Obviously, I'm interested to hear the details of
18 what's happened. But I think that it's fair to open this year
19 by saying that this Legislature, this Committee, have really
20 bent over backwards in an effort to be fair. And I think we are
21 being taken on a ride that's better than anything at Six Flags
22 for all of our efforts.

23 I seriously doubt that Enron will ever send us
24 anything more significant than a picture postcard from the
25 Cayman Islands while I'm alive, much less any of the financial
26 records that we are seeking. So, I think it's time for us to be
27 tough.

28 CHAIRMAN DUNN: Thank you.

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01 Mr. Pratt, if you would take care of the duty
02 with respect to Special Counsel, Mr. Drivon.

03 [Thereupon the witness, LARRY
04 DRIVON, swore to tell the truth,
05 the whole truth, and nothing but

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06 the truth.]
07 CHAIRMAN DUNN: Mr. Drivon, what I'd like to do
08 so is go through the issues in the order that I identified. I
09 know we have several exhibits and film clips to review,
10 particularly with respect to the last issue, that is, the actual
11 destruction of documents.

12 Let's start with perhaps the more simple issue,
13 and that is the inadequacy of the production of documents by
14 Enron, Mr. Drivon.

15 MR. DRIVON: Thank you, Senator.

16 I have two missions. One is to be complete, and
17 the other is to be brief. If I fail in one of those missions,
18 given the gravity of the situation as I see it here, it will be
19 to fail in the area of being brief.

20 I think that we need to do a quick encapsulation
21 of why we got to where we were with respect to compliance. We
22 started with Enron back last April, when I first came to work
23 with this Committee, and met with them after we had given them a
24 letter requesting the production of documents, specific
25 documents.

26 The reason that we gave them the letter was
27 because they professed that they would cooperate with us without
28 the need for a subpoena.

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01 That failing, and after us asking them on several
02 occasions -- myself and yourself personally -- for a pledge and
03 agreement that they would not destroy documents, and having
04 failed to produce such an agreement, we moved forward to taking
05 the step of sending them and having served upon them an official
06 subpoena issued by this Senate.

07 CHAIRMAN DUNN: My pardons for interrupting,
08 Mr. Drivon, but whenever a quorum is established, we seize upon
09 it for roll call purposes.

10 Irma, if you would, please call the roll.

11 MS. MORALES: Chairman Dunn.

12 CHAIRMAN DUNN: Here.

13 MS. MORALES: Chairman Dunn here. Senator Bowen.

14 SENATOR BOWEN: Here.

15 MS. MORALES: Senator Bowen here. Senator

16 Chesbro.

17 SENATOR CHESBRO: Here.

18 MS. MORALES: Senator Chesbro here. Senator

19 Escutia. Senator Johannessen. Senator Kuehl.

20 SENATOR KUEHL: Here.

21 MS. MORALES: Senator Kuehl here. Senator

22 Morrow.

23 SENATOR MORROW: Here.

24 MS. MORALES: Senator Morrow here. Senator Sher.

25 CHAIRMAN DUNN: Having a quorum established,

26 let's move forward. Please proceed, Mr. Drivon.

27 MR. DRIVON: The corporation, that is to say
28 Enron, is reported to have been involved in California under a

0005
01 number of different business organizations, among them Enron
02 Energy Services, having offices in Orange County.
03 We had regularly issued by the State Senate
04 through this Committee a subpoena to them, to Enron, which was
05 regularly served on the 12th of June of last year in Irvine by
06 the Sergeant-at-Arms of the Senate, whereupon we embarked upon
07 an odyssey which took us over several months, during which the
08 California State Senate and this Committee were sued by Enron,
09 forced to retain outside counsel to defend lawsuits by Enron
10 relative to our authority to conduct this investigation, among
11 other things, appearing in court, innumerable meetings,

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12 promises, and stipulations from them, all of which culminated on
13 September the 14th of last year, the last day of legislative
14 session before the fall recess, in which about ten minutes
15 before the full Senate was to take up the question of Enron's
16 contempt, which had been referred to them by this Committee,
17 Enron, quote, "capitulated" to each of the demands that we were
18 making, which included signing the confidentiality agreement
19 that we had proposed and had previously been signed by all of
20 the other market participants requested, a document depository
21 protocol, and an agreement to immediately produce into that
22 depository what we had referred to as the Priority 16 documents,
23 which was a subset of the original subpoena of 112
24 classifications of documents previously subpoenaed.

25 Enron, in Sacramento, had established a
26 depository and deposited approximately 20,000 pieces of paper,
27 most of which were noncompliant with anything.

28 After the "capitulation," unquote, by them on

0006

01 September 14th of last year, they produced an additional
02 quantity of some 40,000 additional documents, most of which --
03 I'm repressing the urge -- are not very valuable. There is --

04 CHAIRMAN DUNN: Well repressed.

05 MR. DRIVON: I'm still working on it, Senator.

06 There is one specific classification of documents
07 that I want to bring to the Committee's attention because it's
08 important. We had requested what are known as Price Forward
09 Curves of Enron, which is their prognostication as to the
10 future of price of electricity in California. We requested
11 those starting back in the early 1990s and going forward. We
12 received into their depository some Price Forward Curves
13 beginning in 1998. That's significant because we were after
14 information that they might have concerning what they thought
15 was going to happen with the price of energy when they helped
16 reorganize the market in California.

17 I instructed staff to go back to the depository,
18 to make an attempt to locate those earlier documents. They are
19 not there.

20 When I spoke yesterday and last week --

21 CHAIRMAN DUNN: Mr. Drivon, let me interrupt.

22 So we are all clear, could you explain in a
23 little more detail why the Committee requested the Price Forward
24 Curves back to the early 1990s, and how it is relevant to the
25 Committee's investigation.

26 MR. DRIVON: It is clear that the reorganization
27 of the market in California was unsuccessful in accomplishing
28 the purposes that were hoped by this body and by others involved

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01 in that process. That is to say, the lowering of the price of
02 electricity in California.

03 During the period of time that restructuring was
04 being urged upon the people of California, Enron and others were
05 professing certain probable results with respect to that
06 restructuring in terms of lowering the price.

07 It is my feeling that it would be very
08 interesting to see what the internal documents of Enron would
09 show relative to what they really thought the price of
10 electricity was going to do in California. Hence, we requested
11 those specific documents.

12 Those documents have not been produced, and have
13 either been concealed or destroyed, and we'll get to that later.

14 CHAIRMAN DUNN: And one last question on the
15 Forward Curves.

16 To your knowledge, are these forward predictions
17 for a month, a year, five years? What's your understanding of

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18 what those Forward Pricing Curves are?

19 MR. DRIVON: This Committee has received by way
20 of testimony a definition of that. And it is common practice,
21 universal practice within the energy industry to produce Forward
22 Price Curves -- that is, their notion of what the forward price
23 will be -- out to a period of time at least as far as their most
24 forward contract. Typically, those would run ten years, perhaps
25 more, and they're constantly revised.

26 In addition to that, if I could have page, I
27 believe I want page 18.

28 CHAIRMAN DUNN: By the way, Evelyn, Donna,

0008 welcome. Thank you again for your services today as usual.

01 MR. DRIVON: Page 18, and if you could blow up
02 Numbers 17 through 22.

03 In addition to Price Forward Curves, Senators, we
04 also requested as Number 17, 18, 19, and 22 of our original
05 subpoena certain documents, financial and accounting documents,
06 from Enron.

07 CHAIRMAN DUNN: If I may interrupt again.
08 At least yours truly, even with it highlighted,
09 will have a little difficulty. Could you read into the record
10 those four requests that were part of the original subpoena that
11 you're referring to.

12 MR. DRIVON: Number 17:
13 "All documents relating to
14 revenues derived from the sale of
15 electricity in California's
16 wholesale electricity markets,
17 including all statements,
18 analyses, assessments, or
19 projections of revenues."

20 Number 18:
21 "All documents pertaining to or
22 containing forecasts or estimates
23 of your revenues from April 1, 1998
24 to present."

25 Number 19:
26 "All documents related to profits
27 derived from the sale of

0009 electricity in California's
01 wholesale electricity markets,
02 including all statements,
03 analyses, assessments, or
04 projections of profits."

05 And Number 22:
06 "All of your unconsolidated
07 income statements from April 1,
08 1998 to the present."

09 These accounting and financial documents -- and
10 I'm going to stop and go back one moment -- with respect to
11 Forward Price Curves before 1998, Senator, I want to report a
12 conversation that I had last week, and that you had this week
13 with me on the telephone with the Vice President and General
14 Counsel of Enron Corporation, Mr. Richard Sanders. He in
15 Houston, Texas, we here by conference call.

16 When I asked him about those earlier Price
17 Forward Curves, he said he could tell me no reason why they had
18 not been produced, and that they were not items that even at
19 that time he believed Enron would have thought were confidential
20 documents.

21 Now, moving from that point to these documents.
22 SENATOR KUEHL: Mr. Chairman, I have the original
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24 subpoena, and therefore I'm able to see those sections.
25 But when you refer to Page 18 --
26 MR. DRIVON: I'm sorry, Senator Kuehl. I'm
27 referring to a date stamp number which simply cues the IT
28 person.

0010
01 SENATOR KUEHL: I see, excellent.
02 MR. DRIVON: I have 38 pages selected from what
03 you see there. So, it's on Page 5 of the original subpoena.
04 SENATOR KUEHL: I have that.
05 Thank you, Mr. Chairman.
06 CHAIRMAN DUNN: Mr. Drivon, continue.
07 MR. DRIVON: Many of the documents that are
08 covered by 17, 18, 19 and 22 would have been documents that
09 included the activities of Enron Energy Corporation, Enron
10 Energy Trading, the Irvine people. These financial documents
11 are not produced by Enron. They are not in the document
12 depository. We have made a special effort to locate those
13 documents. They are not there.
14 In addition, on the next page, 19, Madam
15 Operator, Page 6 of the original subpoena, Number 33 relating
16 to:
17 "All documents sent to, received
18 from, or shared with trade
19 associations, electricity
20 generation owners, or other
21 marketeers or traders who buy,
22 sell, arbitrage, or schedule
23 electricity or ancillary services
24 in California and that relate to
25 the auction for electricity
26 conducted by the California
27 Department of Water Resources."
28 Those documents are not in the depository. I could go on,

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01 Senator.
02 I believe that there are close to a hundred
03 categories of documents subpoenaed in June of 2001 that are
04 either not represented at all in the depository, or are
05 represented in an extremely and totally inadequate way.
06 CHAIRMAN DUNN: Let me be very specific.
07 Given our discussions with most of the
08 generators, traders, does that same statement, Mr. Drivon, apply
09 if we narrow the scope for purposes of adequacy of production to
10 the Priority 16?
11 MR. DRIVON: The answer, Senator, is, a higher
12 percentage of the Priority 16 would be represented in some way
13 by some of the generators, mostly because 16 is a smaller number
14 than 112; therefore, one is a larger percentage.
15 All of the generators have failed to comply at
16 least to some degree. Enron's case is special for a couple of
17 reasons. First of all, their compliance is, without any
18 question in my mind, the worst.
19 Number two, they have been the biggest pain of a
20 rather localized nature of all of them.
21 Number three, there is an urgency that has
22 surfaced within the last two or three weeks, which brings this
23 discussion even more to the fore and of more importance that it
24 be dealt with promptly with respect to Enron. We'll get to that
25 in a moment.
26 CHAIRMAN DUNN: Given your conclusion that Enron
27 has not adequately responded to Priority 16 production in their
28 local Sacramento depository, it's my understanding that you have

0012

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01 had follow-up discussions with Mr. Sanders, who you identified
02 as VP/General Counsel for Enron based in Houston about that
03 inadequacy.

04 What is the current status of those discussions?

05 MR. DRIVON: I think one of the things that we
06 see when important people talk to each other is, it is often the
07 phrase, "I'll have my people get ahold of your people and we'll
08 set something up."

09 Well, yesterday and last week the conversation
10 was, Mr. Sanders to myself and yourself, Enron has no interest,
11 or at least very little interest, in any of its documents at
12 this time. And Enron, through Mr. Sanders, invited us to go to
13 Portland, Oregon and Houston, Texas.

14 CHAIRMAN DUNN: Why Portland?

15 MR. DRIVON: Because Portland, Oregon is
16 apparently the central depository for electronic trading data
17 that they have.

18 SENATOR BOWEN: Question.

19 Is this the first time that you had discussions
20 about going to Portland?

21 MR. DRIVON: The first time that I realized that
22 Portland was an important depository for Enron was last week.

23 SENATOR BOWEN: Has Portland been an important
24 depository for Enron since this Committee first issued a
25 document request in 2001?

26 MR. DRIVON: I cannot speak definitively, but it
27 is my understanding that that was their central location, yes.

28 SENATOR BOWEN: So, it isn't until last week that
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01 we even start to get an indication of where we might go, perhaps
02 because we were being told that documents would be sent here.

03 MR. DRIVON: Well, if you mean were we told
04 previously where we could go get documents --

05 SENATOR BOWEN: Yes, I should have been more
06 clear about that.

07 MR. DRIVON: We have never --

08 SENATOR BOWEN: I think we've been told where we
09 can go repeatedly by Enron.

10 CHAIRMAN DUNN: We will take Committee notice of
11 that fact.

12 MR. DRIVON: We're on the same track, Senator.

13 This is the first time Enron has ever invited us
14 to participate in the retrieval of documents. They told me last
15 week, and they told Senator Dunn and I this week, that we would,
16 quote, "get a phone call yesterday, late yesterday," so that we
17 could arrange to get their IT person together with our IT
18 person, so we could determine how those documents could
19 electronically be retrieved.

20 We have committed -- we now have committed to us
21 the services of a very suspicious IT person. Unfortunately,
22 they didn't get back to me yesterday as to when those folks
23 could get together.

24 SENATOR BOWEN: You know, Mr. Drivon, I think the
25 problem here is that this Committee is in the same kind of
26 position that Charlie Brown is in, in the comic strip every year
27 when Lucy holds the football.

28 MR. DRIVON: Well, and additionally, Senator, the
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01 simile is more apropos because just as Charlie Brown's creator
02 has passed on, so in September will this inquiry.

03 SENATOR BOWEN: So, delay is sufficient to win
04 the game in this instance, if the session comes to an end and we
05 don't have documents.

06 MR. DRIVON: I believe they have a line on that

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07 in Las Vegas.
08 CHAIRMAN DUNN: Senator Kuehl.
09 SENATOR KUEHL: You said suspicious IT person.
10 Do you mean they're suspicious of us, or did you mean suspect?
11 MR. DRIVON: I tried to find an IT person that we
12 could use who would have a high degree of suspicion and an
13 appropriate level of paranoia when searching their documents.
14 I think it is unlikely we will get a
15 straight-forward index to help us. More likely we will need the
16 type of person I think we've found.
17 SENATOR KUEHL: Thank you.
18 CHAIRMAN DUNN: Senator Morrow.
19 SENATOR MORROW: Mr. Drivon, I'm really disturbed
20 to hear some of this information, particularly as it relates to
21 this revelation that we are now invited to go to Portland.
22 You indicated earlier in your testimony in
23 September, the last day of session, a meeting that took place
24 off the Floor of the Senate. It was at that time that
25 representatives of Enron basically agreed to the protocols that
26 we had been negotiating.
27 As you remember, I was present during that
28 lengthy negotiation. I remember it well because, among other
0015 things, I missed 70 Floor votes because of that.
02 It would seem to me that if there was any
03 indication at all, or if there was an issue about us going to
04 Portland or anywhere else, it should have been brought up at any
05 time during the course of those negotiations. At least in my
06 personal recollection, and I think I was there the whole time,
07 it wasn't.
08 I want to know whether or not that compares with
09 your recollection as well.
10 MR. DRIVON: The short answer is, it does,
11 Senator. I need to really attempt to temper my testimony in
12 terms of the level of sarcasm.
13 Not only was it a 70 Floor vote negotiation, but
14 it capped many months of discussion with them. And I have been
15 here now since last April, nearly one year. And although you
16 all promised me a dollar a month, I haven't gotten it yet.
17 My level of patience is perhaps thinner than
18 yours.
19 CHAIRMAN DUNN: With us or with Enron?
20 MR. DRIVON: With Enron. I hadn't considered the
21 other. I'll get to that.
22 You're absolutely correct, Senator. Misled is an
23 apt word.
24 SENATOR MORROW: I just wondered, so I understand
25 everything here, can you tell me anything that has transpired or
26 has occurred since then, other than, and I know we're going to
27 address this, the potential issue of destruction of documents?
28 Has anything transpired between then, when Enron agreed that
0016 they would comply with the protocols and what we negotiated
02 with, and their position now, which is basically, well, if you
03 want, inviting us to Portland?
04 CHAIRMAN DUNN: I should clarify. It's to
05 Portland and to Houston. They've made the invitation for both.
06 MR. DRIVON: Portland has the trading
07 information. Houston has the policy documents.
08 The answer is, they have produced several
09 thousand pages of material of limited value.
10 SENATOR MORROW: Did they offer any reason or any
11 explanation of why we should have to, or why we're now invited
12 to go to Portland and/or Houston --

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13 MR. DRIVON: Two things --
14 SENATOR MORROW: -- as opposed to back then, when
15 we were talking about this subject matter?
16 MR. DRIVON: Two things.
17 SENATOR MORROW: What is that? What are they?
18 MR. DRIVON: First of all, not only have they
19 indicated -- not only have they not indicated a reason why this
20 wasn't previously done, but affirmatively, Mr. Sanders has told
21 us that he does -- that he has no reason. And Senator Dunn was
22 a party to that conversation yesterday.
23 So no, they haven't given us a reason. But
24 they've gone farther than that and now told us that they have no
25 reason.
26 CHAIRMAN DUNN: If I may add one thing, Senator
27 Morrow. My pardons for interrupting.
28 Mr. Sanders specifically said to us yesterday one
0017 of the reasons that they are now willing to open the doors to
02 Portland and Houston for every document except those that may be
03 covered by attorney-client privilege is that, in their view,
04 they have no interest in those documents any more; the trading
05 business has been sold; and the bankruptcy court, he believes,
06 would not authorize the expenditure of any dollars to make any
07 such documents available to us here in Sacramento.
08 Is that a correct characterization, Mr. Drivon?
09 MR. DRIVON: That is, Senator.
10 I want to be sure that nobody believes that I
11 would recommend that this Committee forebear with respect to
12 this issue on the grounds that they're now willing to give us,
13 quote, "everything" for a couple of reasons. Number one, I'm
14 not sure I believe them. And number two, we've also been told
15 that they have no way of knowing whether they still have the
16 documents.
17 SENATOR MORROW: Well, wait a minute. Refresh my
18 recollection, if you or anyone else recalls.
19 When, or what was the date that Enron declared
20 its intent to declare bankruptcy?
21 CHAIRMAN DUNN: September 14th.
22 MR. DRIVON: No, no, no. Bankruptcy, I believe
23 it was December. Somebody will know that.
24 SENATOR MORROW: It was mid or late December, I
25 think.
26 CHAIRMAN DUNN: I believe December 2nd. Staff is
27 indicating December 2nd, Senator Morrow.
28 SENATOR MORROW: That's basically three months
0018 after our negotiations off the Floor of the Senate, in which
02 they've had time to deliver and produce those documents.
03 They hadn't given any indication at all that we
04 would be required, because of financial bankruptcy reasons or
05 anything like, that for us to go to Portland or Houston.
06 I guess what I'm suggesting is, I'd like to know
07 your opinion of this, Mr. Drivon. I mean, that seems like an
08 awfully thin, translucent argument, if you will, for their not
09 producing any documents.
10 MR. DRIVON: I would agree, although thin and
11 translucent may overstate it.
12 They had time to do something else, though, in
13 the meantime, because after this -- after this body adjourned
14 for the fall recess, and before this body reconvened -- you'll
15 see some interesting footage in a minute -- they had time to go
16 to their storage facilities in Houston and collect documents
17 from there, hire SHREDCO, and shred documents.
18 SENATOR MORROW: When was that?

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19 MR. DRIVON: This was apparently begun shortly
20 after Thanksgiving and before this body had an opportunity to
21 get back to the issue.

22 SENATOR MORROW: Thank you, Mr. Drivon. I'll
23 allow you to get back to your testimony, but one quick question,
24 though.

25 I don't know if it's appropriate, or if the
26 Committee intends to -- well, let me just ask.

27 Is there any Enron representatives here today?
28 Do we intend to have any folks from Enron?

0019 CHAIRMAN DUNN: I believe we were told yesterday
01 by Mr. Sanders they would not be present.

02 If there is any Enron representative here, if
03 you'd identify yourself it would be appreciated. Seeing none.

04 MR. DRIVON: On that point, Senator, although
05 there was a subpoena for the deposition, which they did not
06 attend, our hearings have been set up from the beginning,
07 including compliance hearings, the first one of which they
08 didn't attend either, by simply requesting the presence of a
09 representative. In all cases, with exception of Enron, that has
10 been sufficient.

11 Such a request was made and forwarded to Enron.
12 We were told yesterday by Mr. Sanders -- who's being very nice
13 to us. I mean, he's not being mean. He's being very nice -- we
14 were told yesterday by Mr. Sanders that they would not have a
15 representative here pursuant to that request and, quote,
16 "Whatever happens, happens."

17 I think it's a direct quote, if I'm not mistaken,
18 Senator Dunn.

19 CHAIRMAN DUNN: Let me add just one thing for
20 clarification purposes so that the proverbial record is clear
21 about September 14th, when Enron -- and correct me if I'm wrong
22 about this, Mr. Drivon -- when that capitulation by Enron was
23 made, I believe late afternoon, early evening of September 14th,
24 there were actually two resolutions pending on the Senate Floor
25 for vote that day.

26 The first was the recommended sanction for the
27 contempt that we found against Enron during mid-summer.

0020 And the second resolution was what we have
01 referred to as the divestiture resolution, which would have
02 required PERS and STRS to divest themselves of any stock they
03 held in a company declared to be in contempt of the California
04 Legislature.

05 Is that correct, Mr. Drivon?

06 MR. DRIVON: It is.

07 And in addition to that, we were prepared and had
08 recommended to the full Senate that PERS and STRS be urged to
09 divest themselves with respect to any partnerships that they
10 were involved in with Enron. I understand they were involved in
11 partnerships, but I also understand, or I believe, that those
12 partnerships had to do with real estate.

13 CHAIRMAN DUNN: And it was because of the
14 capitulation by Enron, in other words, agreeing to do what the
15 subpoena had required them to do, that we did not go forward
16 with those resolutions; is that correct?

17 MR. DRIVON: Yes.

18 CHAIRMAN DUNN: Any other information that you'd
19 like to provide the Committee as to this first issue before I
20 seek your recommendation and then move on to the second issue?

21 MR. DRIVON: Well, the noncompliance would
22 include not only noncompliance with respect to the subpoena for
23 production of documents, the number of agreements. I just
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25 didn't even put in the fact that we culled some categories from
26 the original 112 in an attempt to give them an easier way to
27 cooperate with us. They agreed to that. That didn't work. We
28 then culled it to a Priority 16, never releasing them from their

0021 01 original obligation. That didn't work either.

02 In addition to that, I've already noted that they
03 missed the first hearing, missed this hearing, and they did not
04 comply with the subpoena to produce a witness.

05 CHAIRMAN DUNN: Which we'll get to. That's the
06 second issue.

07 MR. DRIVON: Okay. I think that's all on that
08 point.

09 CHAIRMAN DUNN: Let me ask, Mr. Drivon, for your
10 recommendation to this Committee as to the first issue relating
11 to the inadequacy of their production of documents in the
12 Sacramento depository.

13 MR. DRIVON: I believe that my recommendation
14 would be two-fold.

15 First of all, that this Committee vote a contempt
16 citation be forwarded to the full Senate for their noncompliance
17 with respect to the production of documents, and their contempt
18 of this Committee and its processes in that regard, and that
19 appropriate sanctions with put forward.

20 I do not believe that their bankruptcy is a
21 device that would preclude the execution of sanctions against
22 Enron for this sort of a situation.

23 And secondly, that this Committee accumulate and
24 dispatch appropriate staff to, perhaps, among other places,
25 Portland and Houston in order to try to retrieve whatever
26 documents may still be available appropriate to our inquiry.

27 CHAIRMAN DUNN: Okay.

28 What we will do is, at the end of the rest of

0022 01 your testimony, Mr. Drivon, I will take your recommendations and
02 turn them into motions for actual votes.

03 With respect to the recommendation about staff to
04 Portland and Houston, I do not believe that needs a formal
05 motion before this Committee. We can handle that
06 administratively.

07 So, having taken your recommendation as to the
08 first one, I will move that as soon as we cover the other two
09 issues.

10 Let's go into issue number two, which I believe
11 is a relatively short issue.

12 I'm sorry, Senator Morrow.

13 SENATOR MORROW: Mr. Chairman, would it be
14 appropriate, I have a question on that one point for the
15 anticipated first motion.

16 CHAIRMAN DUNN: Yes.

17 SENATOR MORROW: As far as I'm concerned, we're
18 back on September 14th, where we had a contempt motion that had
19 already been forwarded to Rules, was pending a Floor vote on the
20 Senate for confirmation of that.

21 It was only by virtue of Enron's officials and
22 representatives agreeing to capitulate, if you will, to the
23 terms of the protocol in the agreement that we didn't go
24 forward.

25 Why are we starting, and maybe we should, but why
26 are we starting here with the Committee? Should we not be back
27 with the resolution that's before the Floor of the Senate and
28 begin from there?

0023 01 CHAIRMAN DUNN: If I may comment on that, Senator

02 Morrow, I believe in our discussions preparing for this hearing,
 03 that was never considered. I think that's an excellent
 04 recommendation, because that issue is still pending before the
 05 Senate.

06 Any comments from any other Members? Senator
 07 Kuehl.

08 SENATOR KUEHL: Well, I think we've, however,
 09 continued to accumulate acts to support a contempt resolution.
 10 Depending on what the underlying whereases or reasons given for
 11 the resolution, we would want to add the continuing refusal to
 12 produce documents between September 14th and this date.

13 I don't know if that makes a difference. I would
 14 be interested to know whether that would be a reason that we
 15 should generate a new motion to take a resolution to the Senate.

16 CHAIRMAN DUNN: If I may, Senator Kuehl, perhaps
 17 the proper motion is, we simply amend the report that is
 18 currently pending before the Floor, add an addendum to that
 19 report. That would alleviate the necessity of starting the
 20 entire contempt process again because you're absolutely correct,
 21 Senator Morrow.

22 So, I think the motion will be that we simply
 23 update or amend the report that is currently before the Senate
 24 Floor for ultimate action by the full Senate.

25 SENATOR KUEHL: And I think that in some way the
 26 record should reflect that the fact that we were given the
 27 option yesterday to go and root around in bunch of documents in
 28 Portland, which we now discover is a repository, as well as

0024 01 Houston, would not alleviate the fact that prior to yesterday
 02 even, that there was an inadequacy of production of documents,
 03 and a continuing one, notwithstanding the offer, go look for
 04 yourself if there's anything left.

05 CHAIRMAN DUNN: Agreed, Senator Kuehl, agreed.
 06 Seeing no further comment from the Committee
 07 Members, that will ultimately be the motion, that we simply
 08 update, amend, the report that is currently pending on the
 09 Senate the Floor.

10 SENATOR KUEHL: Mr. Chairman, did we recommend
 11 sanctions as well in that?

12 CHAIRMAN DUNN: We did. It was a staged
 13 sanction, but it quickly got to one million dollars per day
 14 until compliance was satisfied. Now, that was the
 15 recommendation to the full Senate.

16 There may be debate on the Senate Floor as to
 17 whether that is appropriate. Or, as I think, if I remember
 18 correctly, Mr. Pratt, that actually was also discussed in front
 19 of Rules Committee. And it may be that Rules Committee wishes
 20 to debate that issue itself, given this new information, but
 21 we'll leave that to the discretion of the Chair of Rules and
 22 ultimately to the full Senate Floor.

23 I think the adding of the additional information,
 24 the updating of the current report that is there, Mr. Drivon,
 25 would probably apply to the second issue. Why don't you please
 26 walk us through the second issue relating to the deposition last
 27 week?

28 MR. DRIVON: No problem, Senator.

0025 01 We subpoenaed them to come here to give a
 02 deposition. They didn't show up.

03 CHAIRMAN DUNN: That's probably as short a
 04 presentation as we've every had before this Committee,
 05 Mr. Drivon.

06 For clarification or completeness purposes, will
 07 you share with the Committee what Mr. Sanders' position has been

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08 with respect to that deposition?
09 MR. DRIVON: That subpoena for a deposition was
10 that they produce the person most knowledgeable relative to
11 Arthur Andersen's destruction of documents.
12 Their position is, they don't have any idea what
13 documents Arthur Andersen destroyed.
14 Thereafter, the next comments had to do with a
15 bridge they were trying to sell.
16 CHAIRMAN DUNN: Senator Bowen.
17 SENATOR BOWEN: If I might, I think it's
18 important for the record to reflect the actual written comments
19 of Enron with regard to this.
20 In their letter of February 5th, where they
21 state: "Enron does not know of any Enron employee with
22 knowledge of documents destroyed by Arthur Andersen."
23 CHAIRMAN DUNN: Correct.
24 Mr. Drivon.
25 MR. DRIVON: Their position was, what's the point
26 in sending a representative since we're telling you over the
27 telephone that we don't have anybody that knows anything about
28 that.
0026 The subpoena --
01 SENATOR MORROW: Can I interrupt there.
02 Were they, like, under oath or anything at the
03 time that they were speaking to you on the telephone,
04 Mr. Drivon?
05 MR. DRIVON: No.
06 SENATOR MORROW: It seems to me there's a legal
07 obligation for somebody to be here to, at minimum, say they
08 don't know, if that is the case, they don't know if they have
09 documents.
10 MR. DRIVON: That's correct, Senator. They are
11 not privileged under the law or under the Senate resolution
12 enabling us to take depositions simply to decide they're not
13 going to come.
14 They can produce a witness who then sits here
15 under oath and says what the lawyers said in the letter. That
16 might have different repercussions for them at a later date, but
17 they are not privileged to simply not show up, which is what
18 they did.
19 SENATOR MORROW: They're required to show up, and
20 they make take the Fifth, as apparently that's happened in other
21 parts of this country even today, but they are required to show
22 on these subpoenas.
23 These subpoenas, were they will properly served?
24 MR. DRIVON: Absolutely. The Sergeant-at-Arms of
25 this organization served them. And Enron doesn't deny that they
26 were served. We discussed it with them. They sent us a letter
27 saying, basically, we got your subpoena, and we're not going to
28 show up.
0027 That, believe it or not, was going to be the
01 next point.
02 CHAIRMAN DUNN: It may be my question, which is,
03 following the service of the person most knowledgeable subpoena,
04 or we refer to it as a PMK deposition subpoena, re: Arthur
05 Andersen's destruction of documents, it's true, Mr. Drivon, that
06 the Committee then sent a letter expanding the scope of that
07 subpoena, because after its service, there was information made
08 public about Enron's destruction of its own documents?
09 MR. DRIVON: That's correct. This whole
10 situation over the last month, actually three weeks, has been
11 very fluid.
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14 We learned after the process was put into place,
15 and I believe after the deposition subpoena was finally served
16 by the sergeant, that not only had there been destruction of
17 documents by Arthur Andersen, financial and accounting documents
18 from Enron, and these were audit documents, as we understand
19 based on the statements from Arthur Andersen. These were
20 pursuant to an outside audit.

21 And those documents, as you well know, Senator,
22 having done many cases in the private sector of a similar type,
23 those sorts of audits produce from the client, in this case
24 Enron, thousands of pages of documents, including many, many
25 original source type documents, or copies of source type
26 documents, and not just financial statements and things of that
27 type.

28 We also found out that Enron had destroyed
0028 documents itself, and during that period of time. And then
01 further, it became clear that Enron finally agreed that they had
02 destroyed documents.

03 Because that information came to our possession
04 after the subpoenas had been served, issued and served, we
05 contacted Enron by way of a letter, indicating that we wanted
06 somebody here to tell us about Enron's destruction of
07 documents. And it wasn't a part of the original actual
08 subpoena, except as that subpoena was amended informally by
09 yourself as Chair of this Committee.

10 We have been told --
11 CHAIRMAN DUNN: That's what I was going to ask.
12 Let's zero in on that aspect of the destruction of documents
13 relating to the deposition.

14 Has Mr. Sanders expressed an opinion to you
15 regarding why he would not send anybody to testify about Enron's
16 destruction of documents?

17 MR. DRIVON: Not specifically, except to say
18 that -- Mr. Sanders told me last week, and told us yesterday on
19 the telephone, if I'm remembering him correctly, and I believe I
20 am, that no one at Enron knows what documents were destroyed or
21 who destroyed them.

22 And secondly, Enron has conducted no interviews
23 of any Enron employee with respect to that question. They
24 simply turned the whole matter over to the FBI and walked away,
25 according to Mr. Sanders.

26 They did invite us, Senator, to call the FBI and
27 ask the FBI to inform us on those issues. I considered that to
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01 be a waste of the taxpayers' phone call.

02 SENATOR KUEHL: Mr. Chairman.

03 CHAIRMAN DUNN: Senator Kuehl.

04 SENATOR KUEHL: Could I understand sort of this
05 exchange? Do I understand from what you have just said that
06 Enron has abandoned its claim that the subpoena did not include
07 testimony about destruction of documents by Enron itself?

08 CHAIRMAN DUNN: If I may comment on that, Senator
09 Kuehl, the answer is in the correspondence that Senator Bowen
10 had just read, he does in fact make the reference that the
11 original subpoena does not.

12 However, in our discussions, at least my
13 discussion with Mr. Sanders yesterday, and I believe the several
14 discussions that Mr. Drivon had with Mr. Sanders last week, he
15 did not use that as a basis from which they were saying, we are
16 not going to send anybody to the deposition regarding questions
17 about Enron's destruction of its own documents. They are simply
18 maintaining the position: We have no knowledge about our own
19 destruction of our own documents.

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20 SENATOR KUEHL: But they have essentially, in
21 terms of their failure to appear when subpoenaed to answer
22 questions, they in writing have asserted two things.
23 One is, no one at Enron knows anything about what
24 Arthur Andersen did.
25 And secondly, your subpoena did not cover what
26 anyone at Enron did.
27 CHAIRMAN DUNN: I would add a third to that,
28 Senator Kuehl. That is, if your subpoena did cover what Enron
0030 did, we also don't have any knowledge about it.
01 SENATOR KUEHL: I don't see that in their letter.
02 CHAIRMAN DUNN: It wasn't in their letter,
03 Senator Kuehl. Actually, it was in the sense they referenced
04 that Enron has no knowledge about its own destruction of its own
05 documents, and that was the consistent position maintained by
06 Mr. Sanders over the past week to a week-and-a-half.
07 MR. DRIVON: Senator Kuehl, I believe there are
08 two ways to handle that.
09 One is to treat the amendment, the letter
10 amendment to the subpoena, as requiring them to come and testify
11 on that point.
12 Or two, handle the destruction issue as a
13 separate item.
14 And it has been my recommendation to Senator Dunn
15 that we do it in the latter way, and we're prepared to get to
16 that in a moment.
17 CHAIRMAN DUNN: Which is our third issue for the
18 day.
19 SENATOR KUEHL: Thank you.
20 CHAIRMAN DUNN: Any other comments from Committee
21 Members on the failure to appear at the deposition last week?
22 Mr. Drivon, do you have a recommendation to the
23 Committee?
24 MR. DRIVON: My recommendation to the Committee
25 is that contempt be found by this Committee and referred to the
26 full Senate for its concurrence, and that appropriate sanctions
27 be levied against Enron.
0031 CHAIRMAN DUNN: I will alter that to the same
01 degree we did the first one. And as we finish this third and
02 final issue, I'll make a motion by which, with the resolution
03 that is pending before the full Senate re: contempt, we simply
04 update that report to include the fact that they failed to
05 appear at their deposition last week regarding the destruction
06 of documents.
07 Mr. Drivon, let's go to the third -- yes, I'm
08 sorry.
09 SENATOR MORROW: Before we move on to the next
10 issue, I believe I concur with Mr. Drivon's recommendation for
11 contempt on this basis. It's very clear.
12 One other issue that I can't help, but it raises
13 to mind. We're talking about a deposition or subpoena which
14 required an appearance before a legislative body.
15 What arrest authority, if any, does this body
16 have to serve an arrest warrant to bring in a person most
17 knowledgeable, or some representative?
18 I don't know if that's been considered or ruled
19 out one way or the another.
20 MR. DRIVON: I believe, and we'll want to get a
21 complete opinion on this from Leg. Counsel, but I believe this
22 body has the power to compel the presence of a witness
23 appropriately identified to this body's presence.
24 And I believe, if I'm remembering what I read --
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ENERGY. TXT

26 and I apologize for not having reviewed it this morning -- but
27 I believe that language concerning a similar power is found in
28 one of the old cases on that point. I know Leg. Counsel's not

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01 prepared to issue a nod opinion to me at this point, but I
02 believe -- and I would ask him not to -- I believe that this
03 body does have that authority.

04 If you're asking me for a recommendation on that
05 point, Senator, and if I don't look at you, I won't see you
06 shake your head if you do, I'm to the point of frustration with
07 those folks that, were I capable, I would instruct the
08 Sergeant-of-Arms of this institution to go fetch the appropriate
09 identified person at Enron and remove that person to the
10 presence of this body.

11 And if that isn't -- I'm trying to state it in a
12 way that it might have been stated in the 1928 case.

13 But yes.

14 SENATOR MORROW: Mr. Chairman, I would recommend
15 that -- I don't know the exact procedures, of course -- but to
16 the extent that this Committee has the power to compel, in the
17 face of what is very clearly a flouting to this Committee and to
18 the State Legislature and its investigative authority, that we
19 should explore and exercise every legal authority to compel such
20 testimony.

21 And I think that should be followed up by this
22 Committee and subject to a motion.

23 CHAIRMAN DUNN: Senator Morrow, I'll make that as
24 part of the motion with respect to the failure to appear at the
25 deposition.

26 MR. DRIVON: You know, a comment, if I may be
27 indulged, Senator, on that point.

28 I know that neither of them are currently being

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01 paid as employees by Enron. I suspect that if the
02 Sergeant-at-Arms were instructed to produce Mr. Lay, or
03 Mr. Skilling, or Mr. Keen, should they arrive in the State of
04 California, and produce them before this body, I think Enron
05 could probably find somebody even now who might know something
06 about the destruction of those documents.

07 CHAIRMAN DUNN: Senator Chesbro.

08 SENATOR CHESBRO: Mr. Chairman, I'm perhaps one
09 of the only non-lawyers on this Committee, so I have just sort
10 of this lay perspective of this whole mess.

11 From my standpoint, it's three strikes and you're
12 out, and Enron's out.

13 First of all, they showed contempt for the people
14 of California in the way they manipulated the market, which
15 we've been here trying to establish the clear evidence, but I
16 think any common sense analysis shows that they ripped off the
17 people of California.

18 Then they showed contempt for their shareholders
19 and employees in concealing the condition of the company, and
20 cashing out, key principles in the company cashing out before
21 the collapse and leaving the shareholders and employees holding
22 the bag.

23 And they showed contempt for this Legislature by
24 refusing to participate in a way that recognizes the power of
25 law in the State of California.

26 So, as far as I'm concerned, whatever action we
27 can take, it can't be strong enough.

28 CHAIRMAN DUNN: Any other comments by the

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01 Committee? Senator Bowen.

02 SENATOR BOWEN: My question is with regard to the

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03 recommendation that this Committee makes with regard to the
04 sanctions for contempt on the document production point.

05 I think we've just had a discussion about the
06 subpoena.

07 But the two proposed sanctions from last
08 September 14th, one of which was the million dollars a day fine,
09 and the other which, in retrospect, we would have done
10 California's pension plans a great service had we passed the
11 resolution requiring divestiture of Enron stock, but at this
12 point, that is not an appropriate sanction.

13 What is our responsibility at this point to
14 propose sanctions in light of the fact that the September 14th
15 proposals are no longer appropriate?

16 CHAIRMAN DUNN: What I recommend, Senator Bowen,
17 on that, and that's a very good question, is that we, on a very
18 expedited basis, revisit the issue with Leg. Counsel to seek
19 their recommendations so that then we in turn, as a committee,
20 can embrace that within our addendum to the pending report
21 before the Floor to update the recommended sanctions, which of
22 course would include what Senator Morrow just discussed with
23 Mr. Drivon.

24 SENATOR BOWEN: I have this morning asked the
25 Legislative Counsel to help me understand what the power of this
26 body is to bring someone out of state into California for
27 purposes of contempt proceedings.

28 I don't know what the long arm jurisdiction over
0035 a person is, what the Senate has.

01 I do know that financial sanctions are not likely
02 to be effective at this point because of the bankruptcy of the
03 company. There's just not much left to lose. If they're
04 willing to give us their trading documents because they've
05 already sold that part of the operation, they basically just
06 don't care any more.

07 I think we have to look at -- we have to look at
08 jail time, or we're not going to get the attention of folks
09 who've legitimately been called before this body to produce
10 information that is important to the people of California.

11 And sitting here at this moment, what I see from
12 Enron is a pattern of misdirecting, denying, and deflecting.
13 Basically, it's a classic walnut shell game, three walnut
14 shells, only in this case there is no peep.

15 We have to be willing to use every sanction at
16 our disposal, including jail time, if we want to preserve the
17 ability of this body and this state to investigate matters that
18 are critical to the people who we represent.

19 MR. DRIVON: Can I make a comment with respect to
20 what Senator Bowen just said?

21 CHAIRMAN DUNN: You may, Mr. Drivon, then we want
22 to quickly move on to the third and final item, the destruction
23 of documents.

24 MR. DRIVON: I understand.

25 Senator Bowen, I think you are absolutely correct
26 for two very compelling reasons, three.

27 One, they deserve it. That's number one. And
0036 individuals within that company, or that formerly were with
01 them, deserve it.

02 Number two, there are a number of other market
03 participants out there. Some of them are public companies; some
04 of them are governmental entities or quasi-governmental entities
05 who cannot be allowed to take comfort from successful delaying
06 tactics, or the over-extension of accommodation that we might
07 show Enron.
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ENERGY.TXT

09 And thirdly, I think that there is a message. No
10 one knows what's in those policy documents in Houston, including
11 the other market participants. And if our resolve is clear, it
12 may have a salutary effect with respect to what we get from
13 other people.

14 Fourthly, we are setting a precedent for future
15 times in other investigations. What has taken us months to do
16 in terms of establishing procedure will be a framework upon
17 which others can go forward in policy situations at a later
18 time.

19 CHAIRMAN DUNN: If I may, Mr. Drivon, I also want
20 to add to that, including within our options as a sanction for
21 contempt, and the various bases for contempt, the financial
22 sanction. At least my first blush analysis of it, Senator
23 Bowen, would be that we do recommend to include that because
24 there are situations where a bankruptcy court may itself pierce
25 the corporate veil and go after those who may have extracted
26 financial resources from the debtor. And if in fact we have
27 sanctions here that ultimately may be a part of the collection
28 process there, I think it would be beneficial.

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01 Now, I'm the first to acknowledge that I don't
02 want to see any financial sanctions from this body become a
03 priority over those who may have been victimized by Enron, such
04 as the investors, retirees, the employees. And certainly, any
05 sanctions we may receive, if that should become a reality, I
06 think we can figure out where it ought to be redirected to
07 benefit those who were victimized by the entire process.

08 I just want to ask one follow-up clarification,
09 Mr. Drivon, then move right into the actual destruction of
10 documents issue, because I know we have some videos and other
11 things we need to cover quickly.

12 When you were we were talking about the issue
13 about Sanders and the position about whether Enron had any
14 knowledge about the destruction of Enron documents by Enron, and
15 he has maintained the position they have no such knowledge at
16 this time, isn't it true, Mr. Drivon, based upon your
17 investigation, that you have come across information that in
18 fact Enron, the corporate entity, hired actual shredding
19 companies, such as one by the name of SHREDCO in Texas? Is that
20 correct?

21 MR. DRIVON: That is, and I don't believe that
22 Enron currently maintains the position that no documents were
23 destroyed.

24 CHAIRMAN DUNN: In fact, if in fact the corporate
25 entity hired a shredding company or two, it seems to me the
26 position that they have no knowledge about the destruction of
27 their own documents seems not to be a realistic position to
28 maintain.

0038
01 Would you agree?

02 MR. DRIVON: We have seen -- let me go into a
03 little more detail as we go along, otherwise I'll just repeat
04 myself.

05 CHAIRMAN DUNN: Let's do this, because I know
06 this overlaps with the third issue. Let's go into the third and
07 final issue, Mr. Drivon, and that is the potential destruction
08 of documents by Enron or its agents that were covered by the
09 document subpoena served upon them last June.

10 MR. DRIVON: I've already outlined, Senator, a
11 number of specific document requests, including 16, 17, and 18
12 and 22 of our June 11th, served on June 12th, subpoena. Those
13 were all financial and accounting records. I identified those
14 specifically for a reason.

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15 But before we get to that, I want to call your
16 attention and the attention of the Committee Members to
17 prefatory and foundational point.

18 Since the beginning, since the meeting that we
19 had in April here in the lounge off the Senate Floor with Enron
20 and many of the other market participants, it has been your
21 position personally expressed, and my position personally
22 expressed, based upon our experience in litigating in these
23 sorts of areas in the private sector over many years, that the
24 first thing that need be done is to demand of the person being
25 discussed -- the issues being discussed with that they enter
26 into an agreement not to destroy documents, typically referred
27 to as a, quote, Standard Nondestruct Agreement, the form of
28 which is well understood in multi-district litigation, which, of

0039
01 course, Enron has been a party in other cases, and they full
02 well know what they are. The attorneys that were involved in
03 this are not representing participants in the junior-senior
04 prom, and they knew what we were talking about.

05 To date, as of today, none of the market
06 participants, led by Enron, have been willing to enter into such
07 an agreement, none.

08 In addition to that, other venues, courts, around
09 this state and in other states have visited that issue with
10 respect to Enron and the destruction of energy-related
11 documents. If I could have Page 11, please, blowing up for us
12 lines 17 through 26.

13 CHAIRMAN DUNN: This is from which?

14 MR. DRIVON: This is a transcript, or a portion
15 of a transcript of a hearing which was held late in January in
16 San Diego, California in the litigation presently consolidated
17 there in the state court involving Enron and the other market
18 participants, and the consolidated cases, including the case of
19 the Lieutenant Governor and others. This particular hearing was
20 November the 30th.

21 This is found on Page 39 of the transcript which,
22 I believe, is in the Members' binder.

23 CHAIRMAN DUNN: This was from the San Diego
24 hearings?

25 MR. DRIVON: Yes.

26 It reads as follows, for those whose eyes are as
27 good as mine with respect to the plasma display.

28 "THE COURT: Your representation

0040
01 today is that you are under an
02 obligation to the State Attorney
03 General's Office to preserve
04 everything. And you're under a
05 further obligation to the
06 California Select Committee and
07 the State Senate, a similar -- "

08 Mr. Kirby, interrupting:

09 "That is correct, your Honor.

10 "THE COURT: So nothing is being
11 jeopardized at this time."

12 Answer:

13 "That's my representation as an
14 officer of this court."

15 CHAIRMAN DUNN: For those unfamiliar, will you
16 please identify Mr. Kirby?

17 MR. DRIVON: Mr. Kirby is the attorney who is a
18 named partner in the firm of Post, Kirby, Noonan and Sweat, from
19 San Diego. Represented Enron until he became a casualty of the
20 bankruptcy, and represented that organization here before this

ENERGY.TXT

21 Committee, and made representations to this Committee that
22 documents would not be destroyed by his client Enron, and would
23 in fact be preserved and protected by them.

24 Further, in other places in this transcript,
25 Senator, he says that they were under -- tells this judge they
26 were under an agreement with this Committee.

27 And I am here, under oath, reminding you,
28 Senator, that not only is there no such agreement, they have

0041
01 refused to enter into such an agreement.

02 CHAIRMAN DUNN: You need not remind us,
03 Mr. Drivon. This was the number one issue that we raised with
04 the market participants in the very first meeting we had last
05 March or April.

06 SENATOR PEACE: Mr. Chairman.

07 CHAIRMAN DUNN: Yes, Senator Peace.

08 SENATOR PEACE: This is a matter of clarifying
09 memory.

10 I believe I recognized Mr. Kirby by the
11 description in the court transcript as interrupting the judge.
12 Is that same behavior I recall when he appeared before this
13 body?

14 CHAIRMAN DUNN: It was similar, Senator Peace,
15 yes.

16 SENATOR PEACE: I'm glad that you moved here. I
17 don't want to deflect or anything. I don't know that you're
18 going here anyway, but that is exactly the question that I
19 wanted to ask today. I've been very patient with all of you
20 attorney folks laying the ground work, and I'm sure you're doing
21 the right thing.

22 But as you recall, I was somewhat agitated over
23 our slowness with respect to moving on Enron, and tried to make
24 the argument that Enron was different and distinct from the
25 others.

26 And I continue to be concerned that both in
27 Washington and here the focus of investigation is in the wrong
28 place to find where the manipulation occurred. The manipulation

0042
01 occurred as a consequence of actually owning the organisms in
02 FERC, and owning the organisms at the ISO and the PX.

03 Mr. Kirby's participation, however, is, I
04 believe, very interesting. I found it at the time extraordinary
05 from two perspectives. One, the nature of his behavior. He was
06 by far the most belligerent, and almost seemed to revel in
07 taking the position of challenging any authority of the state.

08 And second, you have to excuse the irony as a San
09 Diegan of finding a San Diegan willing to take the money and
10 represent interests that had pummeled that city for the months
11 leading into the fall of 2000.

12 My question, not being an attorney, is, am I
13 going to ultimately learn that you all in the legal profession
14 have carved out some unique protection from sanctions, or are we
15 going to be able to visit these sanctions against the firm that
16 Mr. Kirby is a principle in?

17 It would seem to me that I do know that in some
18 areas of federal racketeering laws, and other areas, as well as
19 the drug -- our own state law with respect to our ability to
20 seize assets as well as our ability to track money that has
21 moved from the racketeers to the law firms, that we have
22 specific ability to go after those law firms and after that
23 money.

24 I would -- I'm interested in knowing, is there
25 any hope there? Obviously, there's a whole bunch of California
26 ratepayer money that laundered through Enron to Mr. Kirby's law

ENERGY.TXT

27 firm, and he got it out well before the bankruptcy was filed.

28 And frankly, when it comes to, you know, listing

0043

01 evil-doers, I'd list Mr. Kirby well above Mr. Lay. Actually,
02 Mr. Lay at least believed in what he was doing. I mean, so does
03 Osama bin Ladin, but that's sort of another issue. Mr. Kirby
04 was just a whore.

05 I certainly hope that there's some ability for us
06 to go after them if we can't go after the company.

07 CHAIRMAN DUNN: I'll offer some quick comments,
08 Senator Peace.

09 The answer is, there is no exemption. In the
10 representation by Mr. Kirby to the Court, if the Court is
11 satisfied it was a misrepresentation, there is no exemption for
12 that, and he would have to face the consequences. Of course,
13 that's something we'll seek advice from Leg. Counsel.

14 On the broader issue of, can law firms in a --
15 let's just have a hypothetical situation -- be implicated for
16 potential misconduct of its client corporation, for example, the
17 answer is yes. And in fact, there is numerous such cases that
18 have been pursued.

19 For example, there were, I believe, several law
20 firms that were involved in much of the civil litigation in
21 A.G.'s cases resulting from the tobacco industry's conduct. So,
22 to the best of my knowledge, there's no exemption there either.

23 SENATOR PEACE: Are there also opportunities for
24 citizens to pursue Bar Association complaints against Mr. Kirby
25 and his firm?

26 CHAIRMAN DUNN: I don't know the answer to that.
27 I believe there is, but I don't know the answer to that
28 specifically.

0044

01 MR. DRIVON: The answer to that question is
02 yes. Anyone can make a complaint against an attorney.

03 I do want to say that I have absolutely no
04 knowledge or evidence that Mr. Kirby participated in any way in
05 the document destruction at Enron, or in that area at all. I
06 don't have that, and I don't want that to be implied from my
07 comment.

08 All I'm saying is, this is what he said to the
09 Court.

10 CHAIRMAN DUNN: Mr. Drivon, we're now just before
11 1:00. We've got to get to the document destructions. We are
12 time limited here. Let's get right to it.

13 MR. DRIVON: Could I please have the video tape.
14 That is a video tape that shows a composite of
15 some of the investigations.

16 [Thereupon a video-taped portion
17 of ABC Nightly News was played.]

18 MR. DRIVON: This is January of this year.
19 Enron Corporation is one entity. Enron Energy
20 Services, Incorporated is a separate corporate entity. Enron
21 Energy Services is a corporation that, until recently, had
22 offices in Irvine.

23 They are one of the named entities in the
24 documents that we have looked at. They were understood by us to
25 be involved heavily in the energy wholesale electricity market
26 in California.

27 And I thought that this particular piece of
28 footage showing that accounting and financial documents

0045

01 involving this corporation as well as Enron Corporation clearly
02 show a nexus between the California wholesale energy market and
03 the documents that showed up in that box in shreds. These are

ENERGY.TXT

not the documents that went down at the rate of 7,000 pounds per hour by reason of the services of SHREDCO. These are ones that were done in a more individual basis, based on the fact that that looks like a low speed, low capacity shredder that did those.

Thank you.

One of the other interesting things I want to point out. September the 14th -- and incidentally, I was a little bit -- I felt a little slighted when the good Federal Senator forgot to mention the fact that, although they have been involved since the end of October, we have been involved since the beginning of April. Someone accused me of trying to get this Committee to jump on some bandwagon. I had to remind them that we built and have been operating that bandwagon for months and months.

But this Committee recommended, and the Senate ultimately, on September the 14th of last year produced, a capitulation by Enron in the face of a very serious contempt finding by the California State Senate.

This group, this body, did not reconvene until early December. Thanksgiving is in the middle of those two dates, a period of time during which this body had little opportunity to compel anything with respect to Enron.

Reference was made to Thanksgiving in this document that we've just seen by an eye witness from Enron who

was in a position to understand what she was looking at.

It seems to me to be extremely important that those financial documents, including Enron Services, were retrieved from their resting place in Houston, lined up in boxes on the 19th floor, and destroyed during a period of time when this body, although a subpoena, contempt citations, and all other things were pending, and destroyed them then.

CHAIRMAN DUNN: Mr. Drivon, have you collected other information that provides some description of the documents destroyed by Enron?

MR. DRIVON: It has been acknowledged that the documents that were destroyed by Enron were accounting documents, financial documents, and -- referring again to the conversation we had with Mr. Sanders -- well may have included line items, he at least is willing to admit, having to do with the California wholesale energy market.

But further than that, as you know, Senator Dunn, typically in these document production situations where you get to in the final analysis, after all of the motions to compel, and so forth, are gone, and the contempts are found, and the sanctions imposed, what you finally get is a declaration under penalty of perjury that no further documents are available.

We will never get that document from Enron. I say that with a degree of finality because we have been told by their Vice President/General Counsel, Mr. Sanders, as early as yesterday, as late as yesterday, that they, one, do not know what documents were destroyed, and two, cannot tell us what documents, if any, were destroyed relating to the California

energy market, and three, have asked no one at Enron by way of an interview to answer those questions.

CHAIRMAN DUNN: Is it true, Mr. Drivon, that Mr. Sanders also said, in response to your question, that he cannot provide any assurance that the destruction did not include documents covered by this Committee's subpoena?

MR. DRIVON: To be precise, I said, "Mr. Sanders, can you assure this Committee that no documents that would have been responsive to our subpoena have been destroyed?"

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His answer was, "No."

CHAIRMAN DUNN: It's my understanding that you and staff also reviewed all of the various press descriptions concerning the destruction of documents by Arthur Andersen and by Enron, reviewed the various declarations submitted in the private litigation, both in Texas and in California, relating to the destruction of documents, as well as reviewed court transcripts relating to the same.

Is the information contained in that data similar to what you've already described?

MR. DRIVON: It is. I simply thought that this particular presentation was the easiest and most concise.

In addition to which you've just set forth, we've also had direct conversations with attorneys representing the private litigants who are involved in both Orange County and in Houston with respect to the destruction issue and the witnesses that they have been able to collect.

CHAIRMAN DUNN: Two further questions very quickly.

As we've already discussed, when subpoenaed to testify about the destruction of documents, Enron has maintained the position it has no knowledge about what documents were destroyed by Enron; correct?

MR. DRIVON: That's correct.

CHAIRMAN DUNN: And is it your recollection that when Arthur Andersen appear before Congress on this issue of destruction of documents, they pled the Fifth Amendment?

MR. DRIVON: I think Arthur Andersen testified in great part, but also I believe invoked the Fifth Amendment with respect to some of the questions. Or, some of the witnesses did. Some testified; some did not.

CHAIRMAN DUNN: Before I seek your recommendation, Mr. Drivon, to this Committee, are there any questions that any Committee Members have or Senator Peace with respect to the destruction of documents?

SENATOR MORROW: I have a question, Mr. Chairman.

CHAIRMAN DUNN: Senator Morrow.

SENATOR MORROW: It seems clear from the court records, at least, that Enron was acknowledging in open court to a judge that it had an obligation to preserve certain documents as of that court date hearing, November 30th.

I understand that as much as we tried to in this Committee to get them to sign a standard nondestruct agreement, that they did not.

Mr. Drivon, going back, as far back as April of last year, were there any oral assurances or indications that

they would not destroy documents and would otherwise comply?

MR. DRIVON: The answer is yes, and those assurances were made both privately to Senator Dunn and myself and others, and publicly by the only -- one of the only non-sworn speakers before this Committee.

We did not require the attorneys who spoke here to speak under oath. Mr. Kirby told this Committee that the documents were safe. At least, that's my recollection.

SENATOR MORROW: It's my general recollection. I remember when we were meeting off the Senate Floor, in the committee room, the Democrat Caucus room, the Ken Maddy Lounge. And I think that Enron was represented there that day, along with a number of the other market participants, where we discussed discovery issues, including nondestruct.

MR. DRIVON: That's right.

16 SENATOR MORROW: I think this issue was brought
 17 up, and it seemed to be a matter of general agreement that
 18 everybody understood what was being requested, and there was no
 19 way on earth that they were going to go anywhere near destroying
 20 or losing documents.

21 MR. DRIVON: I mean, I think I can pretty well
 22 quote a couple of things that were said. And I believe
 23 Mr. Kirby made those comments here, in front of this Committee.

24 But comments like, "Oh, come on, Larry. You know
 25 we can't destroy anything with all these investigations going
 26 on."

27 I think I recall a statement, "Now really,
 28 Senator, you understand," speaking to Senator Dunn, "the

0050 01 implications of what would happen if we were to destroy
 02 documents in the face of these investigations," and lots of
 03 other statements along those lines.

04 But I believe that Mr. Kirby sat in a chair
 05 similar to the one I'm sitting in, and every hearing that came
 06 up with respect to this, Senator Dunn would at that, as well as
 07 other opportunities, make it a point to once again point out
 08 that they had refused, all of them, to enter into a nondestruct
 09 agreement.

10 SENATOR PEACE: Mr. Chairman, to follow up on
 11 Senator Morrow's point.

12 I want to make sure I'm understanding the context
 13 of Mr. Kirby's interruption of the Judge, in which he introduces
 14 -- seems anxious to make sure the Judge is aware of Enron's
 15 obligation, and the notion that Enron is already operating under
 16 the protection of both the Attorney General's work products as
 17 well as the Committee's work products.

18 There is not the entirety of the transcript in
 19 our binders, but I think there's enough here for me to draw the
 20 inference that it appears that Mr. Kirby is trying to forestall
 21 an order by the Court with respect to the terms and conditions
 22 of meeting and conferring with opposition counsel.

23 So, the material effect of Mr. Kirby's argument
 24 as a sworn officer of the court in the courtroom was to use the
 25 contention in a courtroom that he already had entered into an
 26 agreement in this body and, presumably, with the Attorney
 27 General. And he was successful in forestalling what might
 28 otherwise have been a court order, to which Mr. Kirby would not

0051 01 have enjoyed the benefit of our failure to swear him in, in this
 02 venue.

03 Am I getting something out of context here, or is
 04 that a fair representation of what was occurring in the
 05 courtroom?

06 MR. DRIVON: That is a fair representation, but
 07 to be complete, I should tell the Members of the Committee that
 08 the day following this particular hearing, Mr. Kirby contacted
 09 our office and talked to Ms. Montgomery, who is consultant to
 10 the Committee, and indicated to her that it was his memory that
 11 there was such an agreement.

12 CHAIRMAN DUNN: Let me underscore that. That was
 13 the day after this hearing as reflected in the transcript.

14 MR. DRIVON: That's correct.

15 And Ms. Montgomery has informed me in no
 16 uncertain terms that she corrected Mr. Kirby in that regard, and
 17 further, that she was not altogether convinced of his sincerity.

18 SENATOR PEACE: Were there contemporaneous notes
 19 taken with respect to that conversation?

20 MR. DRIVON: I don't know. She's here.

21 MS. MONTGOMERY: [From the audience] Probably,

but I'm not sure.

SENATOR PEACE: You wouldn't have destroyed any of those if there were; right?

[Laughter.]

MR. DRIVON: Senator, we don't destroy. We sometimes discard.

CHAIRMAN DUNN: As we have been told by one

recipient of a document request. We were told by one company that we got some documents from that they would prefer if we did not use the word "destroy." They would prefer the word "discard."

Seeing no other questions from the Committee, Mr. Drivon, do you have recommendations to the Committee as to the destruction of document issue?

MR. DRIVON: I do. I have two recommendations for the Committee.

CHAIRMAN DUNN: Please share them.

MR. DRIVON: My first recommendation is that this Committee find a contempt with respect to Enron's destruction of documents which most probably contained documents relative to our subpoena, and under subpoena by us. And that that contempt be referred to the full Senate for appropriate sanction and activity.

Secondly, it is my recommendation to the Committee that the Chair of this Committee be empowered to compose and transmit to the appropriate authority a criminal complaint and request for prosecution under Penal Code Section 135. If I could have Page 34, please.

This is contained, I think, in the back of your package, Senators.

If you could blow up at the bottom, where it says Section 135.

For those who can't see that far, Section 135, in Title 7, the chapter Falsifying Evidence and Bribery, Section 135, titled "Destroy or Concealing Documentary Evidence." I

think both destroying and concealing apply here.

"Destroying evidence. Every person who, knowing that any book, paper, record, instrument in writing, or other matter or thing is about to be produced in evidence upon any trial, inquiry, or investigation, whatever, authorized by law, willfully destroys or conceals the same with the intent thereby to prevent it from being produced is guilty of a misdemeanor."

If we could have Page 38, please. Section 182 of the Penal Code has to do with conspiracy, which says that:

"If two or more persons conspire,"

and I'll just give you the import of this without trying to go through the whole thing.

"If two or more persons,"

and that is either a person or an entity. A corporation's a person under the eyes of the law.

"gets together to effectuate a violation of a section,"

including Section 135 in my opinion.

"that then becomes a felony in the State of California, punishable by imprisonment either

in the state prison or in the

county jail, the imposition of
other sanctions by the criminal
court as well."

In this instance, not only do we have the obvious
coordination of activity by more than one person, physical human
being at Enron, obviously, but there is compelling evidence that
more than one Enron entity, although a separate corporation, was
involved. And there may very well be a connection between what
was going on at Arthur Andersen and what was going on at Enron,
since the same sorts of documents at about the same time seemed
to be involved, and the same inquiries, including ours, either
underway or imminent.

So, it is my recommendation to the Committee that
a recommendation -- excuse me -- that a complaint letter be sent
to the appropriate prosecuting authority for further
investigation into this matter, and for prosecution under at
least these two, and there may be other appropriate statutes in
California, as criminal violations.

CHAIRMAN DUNN: Questions from the Committee. No
questions?

SENATOR MORROW: Well, actually I do.

Mr. Drivon, it's clear you cited two California
Penal Code provisions that you believe may have been violated,
which you made the appropriate recommendations for.

Do any of Enron's activities with respect to what
we're talking about today rise to the level of any federal
offenses or criminal violations to your knowledge?

MR. DRIVON: I believe that it is probable that

some of the documents that they destroyed were also -- would
have also been responsive to subpoenas that may have been issued
by federal agencies.

However, I don't believe that a violation of
California law would necessarily be a violation, in and of
itself, of a federal statute.

So, if we forebear, I don't believe it will be
the place of the federal prosecutors to prosecute under these
statutes.

To be clear, Senator, although I'm not willing to
go into it now, I believe that there is evidence that there were
other criminal violations involved with Enron's activities in
the California wholesale energy market.

SENATOR MORROW: Maybe you can open it up for
discussion with the Committee.

As far as your recommendation to transmit it to
appropriate law enforcement authorities, prosecutorial
authorities, who would that be specifically?

MR. DRIVON: Well, I believe that the
jurisdiction with respect to misdemeanor violations would be
appropriately with a local district attorney in whose area or
jurisdiction the violation occurred. And I believe that in this
case that would be properly at least the district attorneys of
Sacramento and Orange Counties.

It may very well be that the Attorney General
would be an appropriate referral, although I don't know that to
be under these particular circumstances. And there may be
others.

We haven't exhausted that point.

SENATOR MORROW: In your recommendation to find
Enron in contempt, the contempt is as a result of destroying
documents that this Committee has requested specifically?

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05 That's your recommendation?

06 MR. DRIVON: Yes, and if one were to ask me,
07 Mr. Drivon, can you identify for me a particular document that
08 was asked for under the subpoena, you know, I think I would have
09 to say it's extremely difficult for me to make a specific
10 identification of a specific document that I was denied access
11 to, to start with, and was denied before I could see.

12 I think that probably the most effective series
13 or method of classifying documents is to compel their
14 destruction before reading. So, I probably could not identify a
15 specific document.

16 But based upon what I see coming out of the video
17 camera that we saw on the wall, where we see the very entities
18 that we've been dealing with, and we know what's going on, and I
19 think it is without significant question that our documents, or
20 some of them, were destroyed.

21 SENATOR MORROW: Was there more than what we saw
22 up there? I remember seeing the part with regard to Enron
23 Energy Services with one document. That's all I've seen. Do we
24 have more than that?

25 MR. DRIVON: Other than the fact that they
26 were -- they acknowledge, Enron now acknowledges that they were
27 financial and accounting documents. And that, you know, the
28 California wholesale energy market was a very large part of

0057 01 Enron's portfolio.

02 And another little point that came up yesterday
03 in our conversation, Senator Dunn directly asked Mr. Sanders,
04 what was the -- or whether there was a direct connection between
05 Enron and El Paso Natural Gas. And I don't know if I would say
06 that the first part of the answer was a soft-shoe, but if it
07 wasn't, it was somewhat attempting to find the appropriate
08 words.

09 The end of that answer was yes. The degree to
10 which they were associated is not fully understood, but yes.

11 So, I mean, I don't think that there are very
12 many of Enron's financial and accounting documents that have
13 nothing to do with the energy market in California.

14 The only thing I've seen printed out that I know
15 was both contained information relative to us and also was
16 destroyed is what happened to wind up intact on a strip in front
17 of that particular television camera that we saw on the screen.

18 SENATOR MORROW: Mr. Chairman, I'm not sure how
19 want to handle it with respect to, as we've been going along,
20 you've indicated what motions that you were prepared to make.

21 I don't know if you want to divide them up, or
22 take them as a whole --

23 Let me think out loud for a moment.

24 At least from where I sit right here, I think
25 there's without any question at all that we've seen sufficient
26 evidence of the contempt with regard to nonproduction,
27 noncompliance, with our subpoenaed document requests, as well as
28 clearly the deposition subpoenas and their failure to appear.

0058 01 I believe certainly from what we've seen by way
02 of the media, and what we've seen here in this Committee and
03 hearing that there may be reasonable grounds and certainly
04 suspicion that relevant documents that were perhaps requested
05 may have been destroyed.

06 I'm not sure that it rises, at least in my mind
07 yet, to an actual finding of contempt, because there is that
08 question of what documents were destroyed and by whom.

09 CHAIRMAN DUNN: If I may make a comment on that,
10 Senator Morrow.

ENERGY.TXT

11 SENATOR MORROW: Certainly.
12 CHAIRMAN DUNN: What I think I will recommend and
13 move is that we recommend that the Senate, full Senate, move
14 forward with the already existing contempt that sits before it,
15 and that we simply amend the report from this Committee to
16 include additional acts that occurred.
17 I think we can put in that report simply a
18 factual recitation as far as what we know about the potential
19 document destruction, and it is simply part of the larger issue
20 of contempt.
21 In other words, there's going to be one contempt,
22 but there will be a large report associated with it.
23 I don't know if that will make a difference to
24 address the concern that you are expressing, Senator.
25 SENATOR MORROW: I suppose it would depend on how
26 it's worded. If it's factually stated as to what we know, as
27 opposed to a conclusively statement at least at this point --
28 CHAIRMAN DUNN: And of course, that would subject

0059

01 to your approval as well, too, as we file the amendment to the
02 full Senate.
03 Senator Bowen.
04 SENATOR BOWEN: Thank you, Mr. Chair.
05 The difficulty here is obvious, in that whenever
06 you have shredding or destruction of documents, you will never
07 be able to prove that those shredded or destroyed documents
08 would have been responsive to a subpoena, unless SOMEBODY, cap,
09 happens to come up with a copy, either in paper or on a hard
10 drive.
11 So, I think whatever we do, we don't want to send
12 the message that you can avoid allowing us to prove that you
13 weren't responsible by destroying or shredding documents.
14 The burden of proof, in my view, shifts when
15 documents are destroyed or shredded, has to shift, then, to
16 whoever destroyed or shredded the documents to demonstrate that,
17 you know, it's only hot chocolate orders that were shredded and
18 not information about forward price curves for natural gas,
19 because we can no longer demonstrates that.
20 So, we need to look at our law and see how it
21 deals with that. If it doesn't deal adequately with it, then we
22 ought to be looking at that.
23 We cannot allow someone under subpoena for
24 documents to avoid contempt citation by shredding documents.
25 CHAIRMAN DUNN: Let's go, if I may, Mr. Drivon,
26 make it quick because I want to have Senator Kuehl comment. I
27 know Senator Peace has some comments as well.
28 MR. DRIVON: Senator Bowen, the law in California

0060

01 does, as a matter of fact, not only do that, but create a
02 presumption -- I'm sure Professor Sher knows better than I --
03 create a presumption that if you conceal or destroy a document,
04 it is presumed that that document was against your interest.
05 Did I get that right, Professor?
06 SENATOR SHER: That's kind of a universal thing,
07 but whether it applies to this situation --
08 CHAIRMAN DUNN: Senator Kuehl.
09 SENATOR KUEHL: Let me just understand what
10 you're proposed motion would be.
11 It would be to renew the request to the Senate to
12 adopt a citation of contempt against Enron for all of the acts
13 that we have indicated, stated simply as facts in support.
14 Where the destruction of documents that are
15 under subpoena would be subject to contempt, one document would
16 be sufficient; is that correct?

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17 CHAIRMAN DUNN: Yes, that's correct.
18 SENATOR KUEHL: One page of a document would be
19 sufficient for contempt.

20 I believe, as Senator Bowen indicated, our sort
21 of viewing of a piece of paper with the name of the entity on it
22 could be sufficient.

23 Secondly, the other motion will be to empower the
24 Chair to send a criminal complaint, or a request for
25 prosecution, to the appropriate authority. And I assume that
26 means we don't need to decide which district attorney for which
27 potential criminal act, or whether the Attorney General, but
28 rather to request of all prosecuting authorities that they take

0061 01 action in their jurisdiction vis-a-vis these actions.

02 CHAIRMAN DUNN: Correct.

03 Senator Peace.

04 SENATOR PEACE: Mr. Chairman, a point that may be
05 adequately addressed in the current construct of the proposed
06 contempt motion or not.

07 I think it's important, though, both from a
08 legal, narrow perspective as well as from a policy perspective.
09 From the narrow legal perspective, it's important that the
10 contempt citation be, I believe, overtly connected to the public
11 charge of this Committee. And be connected to the consequence
12 of deflection of attention, time, energy in which this Committee
13 otherwise would have been focused upon, and correctly getting
14 the energies of the entire State of California, including our
15 Congressional delegation, who has now, finally this year, woke
16 up to the fact that the problem was at FERC, and that's where
17 the energy needs to be.

18 Unfortunately, this Committee's, as well as other
19 committees', time and attention, this Legislature's time and
20 attention, was deflected by a masterfully orchestrated public
21 relations campaign. The destruction of documents is just the
22 end of that pattern of behavior.

23 The charge of this Committee was to look at the
24 public policy question of how, on a going forward basis, lessons
25 can be learned and this information be utilized into properly
26 responding to and preventing the ability of similar occurrences
27 in the past.

28 The net result of the continuing behavior by

0062 01 Enron, and I dare say, given the fact that their cohorts in
02 crime have similarly refused to sign those documents, has been
03 to accomplish their public policy goal of forestalling attention
04 at FERC, which was the only venue where there was the legal
05 authority to fix the problem.

06 Now, from a legal perspective, I think it's real
07 important that that be in context.

08 Having read the Los Angeles Times today, New York
09 Times over the weekend, and for the first time having people
10 begin to realize, and business begin to realize, that Enron did
11 not unravel because of these partnerships. Enron did not
12 unravel because of its accounting practices.

13 Its accounting practices hid the fact that
14 Enron's core business, that from which 90 percent of its profits
15 came from, failed. And it failed because it could only succeed
16 as long as there was extreme volatility in the wholesale market.

17 Now, what's important for us, on the public
18 policy side of articulating this clearly is, I think we could
19 have the opportunity to refocus our colleagues in Washington.
20 There was a call by Mr. Wood, current Chairman of FERC, and at
21 request of the President, for FERC for initiate an investigation
22 into the wholesale market. I mean, that's like asking Willie

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23 Suttan to investigate why banks are robbed.

24 The investigation needs to be into FERC. If Ken
25 Lay was the orchestra leader, FERC was his rhythm section. And
26 it doesn't matter how good a conductor you are, without a rhythm
27 section there's no music, and you're just waving your arms.

28 So, what I would hope we would do is take

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01 advantage of this to send a very clear message, not only to
02 those other energy companies, as Chairwoman Bowen correctly
03 pointed out, in terms of influencing their behavior over the
04 next few months, because it's going to be critical that we get
05 policy makers on a much faster track because, believe me,
06 there's no doubt in my mind that documents have already
07 disappeared in other trading floors.

08 It's not an accident that Chevron, the parent of
09 Dynegy, has moved a billion dollars in to cover Dynegy's trading
10 operations. It's not an accident that Dynegy was the first at
11 the block, attempting to buy Enron's trading operation before it
12 became clear what was going on. As soon as the market
13 stabilized, and as soon as there was a continuity of interest
14 about what the forward market was going to look like, the price
15 crashed, and Enron ran out of time to run out its ponzi scheme.

16 Now, the reason why I want to want to put that on
17 the table is because of the word "time." And Mr. Morrow, my
18 concern, Mr. Morrow, is that while I appreciate, and I know that
19 you all here are much better at the linear requirements from a
20 legal perspective to make sure that we don't misspeak, misstep,
21 and do folks a favor by overreaching, or what-not, but to date,
22 with all due respect, our deliberateness has led to
23 accommodating the escape.

24 In essence, it's not unlike the Al Qaeda and
25 Taliban fighters that managed to get away while the Afghans
26 convinced the Americans to allow a couple days of negotiation in
27 that period of time.

28 And time is these guys' escape route.

0064

01 There is -- and I know that I'm not a patient
02 fellow. I've tried to be. Over the last year, I tried to
03 communicate these things privately as much as I could.

04 I don't think there was any mystery to what was
05 going to happen ultimately; it was just a matter of how long it
06 was going to go. That's why I could say in February Enron was
07 going to fail as a company.

08 But what's happening today is, the trading floors
09 at other companies are also in similar condition. But their
10 trading floors don't represent 90 percent of their business
11 model, and so it doesn't show up necessarily.

12 And it becomes critically important, because we
13 have contracts being renegotiated. We have the FERC issue in
14 front of us, and whether FERC is going to step in and assist in
15 that. And, quite frankly, we have a misdirected Congressional
16 investigation that's looking at political issues as opposed to
17 the core issues from a public policy perspective.

18 Your action today could be the single most
19 critical communication at a federal level to redirect that
20 federal investigation into the regulators and the market
21 participants as to why the market failed, which precipitated all
22 of this.

23 CHAIRMAN DUNN: Thank you, Senator Peace.

24 Senator Sher, if I can caution you, we're already
25 being beckoned to the Floor.

26 SENATOR SHER: I know, but you want us to vote on
27 a motion.

28 CHAIRMAN DUNN: Yes, indeed.

ENERGY. TXT

0065

01 SENATOR SHER: I'd like to know again what the
02 motion is, because your exchange with Senator Kuehl confused me.
03 CHAIRMAN DUNN: If I may just state them, Senator
04 Sher.

05 SENATOR SHER: Well, let me just make sure it's
06 not this.

07 You are not going to recite in elaborating the
08 document that the Senate already has that Enron engaged in
09 shredding, and therefore we should refer to the appropriate
10 prosecutor a recommendation for contempt if they can show that
11 it was documents that we had previously subpoenaed?

12 CHAIRMAN DUNN: Not quite, Senator Sher.
13 Let me state the motions. There's two of them
14 now, Irma. Here we go.

15 The first motion will be that we request the
16 Senate, full Senate, move forward with the contempt report that
17 is currently pending before the Senate, but that we augment that
18 current report with an updated factual recitation of what has
19 occurred since that report was submitted to the full Senate, I
20 believe in August of last year.

21 The augmentation of the Report Re: Contempt
22 should include recommendations as far as what sanctions are
23 appropriate over and above what was already made last year,
24 including, as Senator Morrow had indicated, any available
25 remedies to force attendance for the deposition that was ignored
26 last week.

27 The second motion is that this Committee
28 authorize the Chair to prepare a complaint to all appropriate

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01 law enforcement agencies to investigate the potential for a
02 criminal violation of Penal Code Sections 135 and 182 by Enron
03 in the reported destruction of documents that were potentially
04 covered by our document subpoenas served upon them last June.

05 Those are the two motions, Senator Sher. The
06 contempt and the criminal referral are separate and distinct
07 from each other.

08 SENATOR SHER: The second is asking the
09 prosecutors to look at that.

10 CHAIRMAN DUNN: Further investigate.

11 SENATOR SHER: Not alleging that there have
12 been --

13 CHAIRMAN DUNN: Right. Preliminarily, it appears
14 there has, but further investigation is necessary; correct.

15 SENATOR SHER: Okay.

16 CHAIRMAN DUNN: Seeing no further comments or
17 questions, why don't we turn to motion number one, and Irma,
18 please call the roll.

19 MS. MORALES: Chairman Dunn.

20 CHAIRMAN DUNN: Aye.

21 MS. MORALES: Dunn Aye. Senator Bowen.

22 SENATOR BOWEN: Aye.

23 MS. MORALES: Bowen Aye. Senator Chesbro.

24 SENATOR CHESBRO: Aye.

25 MS. MORALES: Chesbro Aye. Senator Escutia.

26 Senator Johannessen. Senator Kuehl.

27 SENATOR KUEHL: Aye.

28 MS. MORALES: Kuehl Aye. Senator Morrow.

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01 SENATOR MORROW: Aye.

02 MS. MORALES: Morrow Aye. Senator Sher.

03 SENATOR SHER: Aye.

04 MS. MORALES: Sher Aye.

05 CHAIRMAN DUNN: Irma, as to the second motion

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regarding the referral to the appropriate law enforcement representatives, please call the roll.

MS. MORALES: Chairman Dunn.

CHAIRMAN DUNN: Aye.

MS. MORALES: Dunn Aye. Senator Bowen.

SENATOR BOWEN: Aye.

MS. MORALES: Bowen Aye. Senator Chesbro.

SENATOR CHESBRO: Aye.

MS. MORALES: Chesbro Aye. Senator Escutia.

Senator Johannessen. Senator Kuehl.

SENATOR KUEHL: Aye.

MS. MORALES: Kuehl Aye. Senator Morrow.

SENATOR MORROW: Aye.

MS. MORALES: Morrow Aye. Senator Sher.

SENATOR SHER: Aye.

MS. MORALES: Sher Aye.

CHAIRMAN DUNN: Both motions have passed.

We are adjourned. Our apologies for going over a little bit, everybody.

[Thereupon this portion of the
Senate Select Committee hearing
was terminated at approximately.
1:45 P. M.]

CERTIFICATE OF SHORTHAND REPORTER

I, EVELYN J. MIZAK, a Shorthand Reporter of the State of California, do hereby certify:

That I am a disinterested person herein; that the foregoing transcript of the hearing of the Senate Select Committee to Investigate Price Manipulation in the California Wholesale Energy Market was reported verbatim in shorthand by me, Evelyn J. Mizak, and thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for any of the parties to said hearing, nor in any way interested in the outcome of said hearing.

IN WITNESS WHEREOF, I have hereunto set my hand this _____ day of _____, 2002.

EVELYN J. MIZAK
Shorthand Reporter